Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 66
Petitioner,

v.

HOUSTON LIGHTING AND POWER COMPANY, a Subsidiary of HOUSTON INDUSTRIES, INC., as successor in interest to UTILITY FUELS, INC.
Respondents.

On Petition For Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit
No. 96-20414

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. The fundamental question presented for review by this case is whether or not the United States Court of Appeals for the Fifth Circuit has issued a Decision in direct conflict with long-standing precedent of this Court by virtue of the manner in which the Fifth Circuit went about analyzing and resolving the question of whether or not an underlying Arbitration Award should be enforced or vacated?

2. This case presents the corresponding question for review as to whether or not the United States Court of Appeals for the Fifth Circuit, under the guise of determining whether or not an Arbitrator "exceeded his authority" in issuing an Arbitration Award under a Collective Bargaining Agreement, in effect exceeded its authority, and thereby usurped the authority of the Arbitrator?

3. This case also presents for review the question of whether or not a Federal Court should, in considering the question of whether to enforce or vacate an Arbitration Award arising out of a Collective Bargaining Agreement, indulge in extensive analysis of the Collective Bargaining Agreement, including the contractual provisions involved in the underlying Arbitration Award, or whether the Court should in fact limit its analysis to a consideration of the question of whether the

Award "draws its essence" from the Collective Bargaining Agreement, and limit its contractual review to only such part of the Collective Bargaining Agreement that addresses the authority of the Arbitrator?

LIST OF ALL PARTIES

The undersigned counsel of record certifies that the following listed parties have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

HOUSTON LIGHTING & POWER CO.	-	Respondent
HOUSTON INDUSTRIES, INC.	-	Parent Company
UTILITY FUELS, INC.	-	Respondent
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 66	-	Petitioner
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO	-	Parent Organization
LARRY WALKER	-	Grievant

ROBERT W. RICKARD
Attorney of Record for Petitioner

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LIST OF OPINIONS

1. Decision issued on January 13, 1997 in *Houston Lighting & Power Company vs. International Brotherhood of Electrical Workers*, No. 94-20414 in the United States Court of Appeals for the Fifth Circuit.
2. Final Judgment issued by Judge David Hittner on April 1, 1996, in *Houston Lighting & Power Company vs. International Brotherhood of Electrical Workers, Local No. 66*, Civil Action No. H-94-4362 in the United States District Court for the Southern District of Texas, Houston Division.
4. Arbitration Award issued by Arbitrator Harold H. Leeper on July 26, 1994, in AAA No. A 70 300 0031 93; *Utility Fuels, Inc. -and- International Brotherhood of Electrical Workers, Local 66, AFL-CIO.*

STATEMENT OF JURISDICTION

This case seeks the review of a Decision of the United States Court of Appeals for the Fifth Circuit entered on January 13, 1997. The underlying lawsuit was originally instituted in the United States District Court for the Southern District of Texas, under the auspices of Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, seeking to set aside an Arbitration Award issued through the operation of a grievance procedure

contained within a Collective Bargaining Agreement. This being a case instituted under the Labor Management Relations Act, seeking to set aside an Arbitration Award, it is one over which the Federal Courts have jurisdiction in the first instance, and over which this Court has jurisdiction to review by Writ of Certiorari.

APPLICABLE STATUTES

1. Section 301 of the Labor Management Relations Act, 29 U.S.C. §185 (See Appendix 4).
2. Section 203(d) of the Labor Management Relations Act, 29 U.S.C. §173(d) (See Appendix 5).

STATEMENT OF THE CASE

This case seeks the review of a decision of the United States Court of Appeals for the Fifth Circuit affirming a Judgment of the United States District Court for the Southern District of Texas which vacated an Arbitration Award. The Fifth Circuit Decision, in affirming the Judgment of the District Court, also, in effect, vacated the underlying Arbitration Award, which was rendered as a result of Arbitration proceedings held between the two parties to a Collective Bargaining Agreement, one of them being the Petitioner, International Brotherhood of Electrical Workers, Local Union No. 66.

In the late Winter and early Spring of 1992, Houston Lighting & Power Company and its sister Company, Utility Fuels, Inc., both subsidiaries of Houston Industries, Inc., undertook and effectuated a very significant layoff of employees. A substantial number of the employees laid off by the two Companies were covered by Collective Bargaining Agreements then in effect between the Petitioner, International Brotherhood of Electrical Workers, Local No. 66, and the two Companies.[1] The two Companies devised a method of selecting the individuals covered by the Collective Bargaining Agreements for layoff which the Companies contend complied with the applicable contract language. That language, found in the Agreement between Utility Fuels and Local 66, provided, in pertinent part, as follows:

> "Section 7. Seniority. After completion of probationary period, seniority shall date from the first date of employment by the Company at that facility, except where an employee resigns or is discharged for just

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[1] The Petitioner Union was party to separate Collective Bargaining Agreements with Houston Lighting & Power and with Utility Fuels. However, the operative language relevant to the issues presented to the Arbitrator, and thus to the proceeding before this Court, was substantively identical, and the manner in which the two Companies went about conducting the layoff, related to this contractual language, was also substantively identical.

cause and is later re-employed, then seniority shall date from the last date of employment at that facility. In the event of promotions, layoffs, or a permanent reduction in the working force at a facility, where ability, skill and qualifications are equal, length of service at that facility shall govern. Employees covered by this Agreement who are laid off will be given first consideration for re-employment for positions covered by this Agreement, subject to the Company's determination of ability, skills and qualifications, for a period of one year after the layoff effective date. When Company determines to transfer employees form one location to another, Company will request volunteers and select the senior volunteers where ability, skill and qualifications are equal; if there are not sufficient volunteers with the required ability, skill and qualifications, Company will select the employees with the least seniority where ability, skill and qualifications are equal. The Company shall determine ability, skill and qualifications subject to an employee's right to assert a grievance under Article II."

Substantively identical language was contained in the Petitioner's Contract with Houston Lighting & Power. Ostensibly relying upon this language, the two Companies, in determining which employees to select for layoff, devised a scheme whereby every member of the Bargaining Units represented by the Union was evaluated by Management, through the utilization of a so-called "Special Performance Profile", and then, based upon the results of the evaluation, each employee was placed in one of three categories: "Above Average", "Average", or "Marginal". Employees were then selected for layoff utilizing seniority within each classification or grade, so that employees first in the "Marginal" category were laid off, in inverse order of seniority, and then, if necessary, employees in the "Average" category, and so on.

As a result of the manner in which employees were selected for layoff, the Petitioner Union filed a large number of Grievances against the two employers on behalf of laid off employees, contending, essentially, that their selection for layoff violated the Collective Bargaining Agreement, and these employees' seniority rights under the Agreement. Two of the employees for whom the Union filed such Grievances were Sam Thornal, a Heavy Equipment Operator, and Larry Walker, a Mechanic, both of whom were employed by Utility Fuels, Inc. at Houston Lighting & Power's electric generating station in Limestone, Texas. Thornal was the most senior Heavy Equipment Operator at the

Limestone facility employed by Utility Fuels, and Walker was one of the most senior Mechanics, and a long-time Union Steward at the same facility. Each was laid off based upon a "Marginal" rating received as a result of the Special Performance profiling process. These two Grievances ultimately became two of many Grievances that were submitted by the Union and the two Companies, Houston Lighting & Power and Utility Fuels, to Arbitrators for resolution, with some cases being resolved in favor of the Union, and some in favor of the Companies.

The first Grievance to be heard by an Arbitrator involving an employee laid off by Utility Fuels was the Grievance of Sam Thornal. At the Hearing, the Union raised two basic contentions: First, that the entire process utilized by the Company to select employees for layoff violated the Collective Bargaining Agreement, and requesting that the entire layoff be set aside, and secondly, that even if the overall process utilized by the Company did not violate the Agreement, that the process as applied to the Grievant, Sam Thornal, did in fact violate the Agreement. In essence, the second contention of the Union was an individual claim regarding the Grievant, Sam Thornal, and contending that the performance profile process as applied to the Grievant had produced an inaccurate result. The Union contended that Thornal was equal to or better than, in terms of "ability, skills and

qualifications", other Heavy Equipment Operators with less seniority than Thornal who had not been laid off.

Arbitrator Otis King, the Arbitrator selected by the parties to hear the Thornal Grievance, issued a Decision and Arbitration Award on December 31, 1993. In his Award, Arbitrator King rejected the Union's first argument, and concluded that the process itself was not facially violative of the Contract. However, Arbitrator King sustained the Grievance with regard to the individual Grievant, Sam Thornal, finding that in fact the Grievant Thornal was at least equal to or better than, in terms of "ability, skills and qualifications", at least one Heavy Equipment Operator with less seniority than Thornal who had not been laid off. As a result of this conclusion, Arbitrator King ordered that Thornal be reinstated to his position, with full back pay.

Not long thereafter, the Grievance of Larry Walker was presented for Hearing by the Union and the Company. The Arbitrator, Harold H. Leeper, issued a Decision on July 26, 1994, sustaining the Grievance and ordering the reinstatement of Walker to his former position, with full backpay and benefits. In this Grievance, the facial attack upon the entire evaluation and layoff process originally made by the Union in the Thornal Grievance was no longer an issue, as a result of Arbitrator King's ruling in favor of the Company on that issue. What was left, however, was the same individual Grievance as had been pursued in the Thornal case: A Grievance over

the Company's determination of Walker's "ability, skills and qualifications", and it was this Grievance that was sustained by Arbitrator Leeper, who found that Walker was not deserving of the "Marginal" rating that had been placed upon him by the Company, and thus led to his layoff.

In the meantime, on March 18, 1994 Houston Lighting & Power Company[2] had filed a lawsuit against the Petitioner Union in the United States District Court for the Southern District of Texas, seeking to set aside Arbitrator Otis King's Award issued in the Sam Thornal Grievance.

On August 25, 1994, United States District Judge Norman W. Black, Chief Judge of the Southern District of Texas, issued an Order denying the Summary Judgment Motion of the Company and granting Summary Judgment in favor of the Union, thereby enforcing Arbitrator King's Award. Thereafter, on September 13, 1994, Houston Lighting & Power filed a Notice of Appeal with the United States Court of Appeals for the Fifth Circuit, appealing Judge Black's Decision.

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[2] By the time this lawsuit was filed, Utility Fuels, Inc. no longer existed. It had been absorbed into Houston Lighting & Power in a corporate reorganization, and all employees of Utility Fuels had been absorbed in and become employees of Houston Lighting & Power. Thus Houston Lighting & Power functioned as the adversary employer with the Union in relation to all of the Grievances that had originally arisen out of Utility Fuels.

Still later, on December 22, 1994, Houston Lighting & Power filed yet another suit in the United States District Court for the Southern District of Texas, in this case seeking to set aside the Arbitration Award issued by Harold Leeper on July 26, 1994, in the Larry Walker Grievance. It is this second lawsuit which underlies this Petition for review.

In the Thornal case, the Fifth Circuit ultimately reversed the Decision of Judge Black and vacated that Decision and the Arbitration Award. *Houston Lighting & Power Co. v. The International Brotherhood of Electrical Workers, Local Union No. 66*, 71 F.3d 179, 183-84 (5th Cir. 1995). The Petitioner Union filed a timely Petition for Writ of Certiorari in that case, which Petition was denied on October 7, 1996.

Subsequent to the Fifth Circuit's Decision in the Thornal case, and to its denial of the Union's Petition for Rehearing, United States District Judge David Hittner, on April 1, 1996, issued an Order vacating and refusing to enforce, the Award of Arbitrator Harold Leeper in the Larry Walker case. This Decision of Judge Hittner was clearly based upon his reading of the Fifth Circuit's Decision in the Thornal case.

Following Judge Hittner's Decision vacating Arbitrator Leeper's Award, the Petitioner filed a timely Notice of Appeal with the United States Court of Appeals for the Fifth Circuit. Briefs were filed, and subsequent to this Court's denial of the Petition for Writ of Certiorari in

the Thornal case, *International Brotherhood of Electrical Workers, Local Union No. 66 v. Houston Lighting & Power Company,* No. 95-17575, the United States Court of Appeals for the Fifth Circuit issued an Order, essentially relying upon its prior Decision in the Thornal case, affirming the Decision of Judge Hittner.

The Petitioner Union now asks this Court to grant this Petition for Writ of Certiorari, and to review the Fifth Circuit's Decision in the Walker case. This request of the Petitioner Union is based upon the Union's well considered and good faith belief that the Fifth Circuit's Opinion directly conflicts with numerous opinions of other Circuit Courts, and with long-standing precedent of the United States Supreme Court regarding the role of the Court in reviewing and enforcing Arbitration Awards in the Collective Bargaining Agreement context. The Union believes that the Fifth Circuit Opinion, if allowed to stand, will likely have the effect of seriously undermining grievance and arbitration procedures contained in Collective Bargaining Agreements throughout the Fifth Circuit.

ARGUMENT

Any basic review of federal labor law, and of the many decisions of the Federal Courts, including this Court, on the issue, should lead one to the conclusion that there can be no question but that arbitration is the

favored method of resolving labor disputes. Section 203(d) of the Labor Management Relations Act of 1947, as amended, states:

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." (29 U.S.C. §173(d)).

The foregoing provision, in and of itself, manifests a clear congressional intent to allow, and in fact encourage parties to collective bargaining agreements to resolve their disputes through an arbitral process.

Consistent with that congressional policy, this Court first held, in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), that Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, vested jurisdiction in the federal district courts to enforce agreements to arbitrate and arbitration awards. Moreover, the Court's Opinion in *Lincoln Mills* served as a mandate to all federal courts to fashion a body of substantive law that would effectuate this congressional policy. Three years later, in the famous *"Steelworkers*

Trilogy",[3] the Court further refined the appropriate role of the courts in actions brought to enforce agreements to arbitrate and to enforce arbitration awards. The Court made direct reference to Section 203(d) and the policy expressed therein, and then stated:

> "That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *Steelworkers v. American Manufacturing Company, supra*, at 565.

American Manufacturing Company involved an action to enforce an agreement to arbitrate, but in a companion case, this Court discussed the role of the Court in actions brought to enforce arbitration awards. The essence of the Court's statement was that the courts should stay away from the merits of the dispute, and undertake only a very limited role:

> "The refusal of the courts to review the merits of an arbitration award is the proper

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[3] *Steelworkers v. American Manufacturing Company*, 363 U.S. 564, 565 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 595 (1960).

> approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. As we stated in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, ante. . . . decided this day, the arbitrators under these collective agreements are indispensable agencies in the continuous collective bargaining process. They sit to settle disputes at the plant level -- disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements." *Steelworkers of America v. Enterprise Wheel & Car Corp., supra.* at 595.

As indicated by the foregoing opinion of this Court, the role of the federal courts in an action seeking to vacate or set aside an arbitration award is, indeed, extremely limited, and any application seeking to have an arbitration award set aside should be granted only in the rarest of circumstances. Clearly, this Court premised its conclusion upon the favored position which arbitration enjoys in the labor relations context, and on the fact that:

> "Arbitration of labor disputes in collective bargaining agreements is part and parcel of the collective bargaining process itself." *Steelworkers of America a. Warrior & Gulf Navigation Co., supra.* at 578.

In the more than three and one-half decades that have passed since this Court first issued its Opinion in the "*Steelworkers Trilogy*", no decision has emanated from this Court that would in any way suggest that the principles enunciated by this Court in the *"Steelworkers Trilogy"* are not still the law of the land. To the contrary, any decision issued by this Court over the years, such as *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987), have consistently reaffirmed the teachings of the *Steelworkers Trilogy*. Moreover, countless opinions of Federal Circuit Courts over this same period of time have manifested full allegiance to this long-established law.

In this case, however, we have an Opinion that violates the most fundamental principle of the long-standing precedent of this Court. In issuing its decision vacating the underlying Arbitration Award, the Fifth Circuit has done the one thing that this Court most vehemently warned against: The Fifth Circuit has stepped into the role of the Arbitrator, and substituted its judgment for that of the Arbitrator.

While it is true that a cursory reading of the Fifth Circuit Opinion discloses some facial recognition of, and suggested adherence to, the long-standing precedent of this Court and of the Fifth Circuit, a true substantive analysis of the Fifth Circuit Opinion, and more particularly, of the Majority Opinion in the *Thomal* case,[4] discloses that in fact the Court failed to follow the teachings that it acknowledged to exist. No more apparent is this fact than in the following excerpt from the Fifth Circuit Opinion, quoting from the Majority Opinion in *Thomal*:

> "The phrase 'subject to an employee's right to assert a grievance' means that the employee may assert one or both of two contentions: (1) first he may assert that the system and procedures used by the

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[4] It was in the *Thomal* case, *Houston Lighting & Power Co. v. International Brotherhood of Electrical Workers, Local Union No. 66*, 71 F.3d 179 (5th Cir. 1995), *cert denied*, that the grievous error herein complained of originally occurred. Indeed, the Fifth Circuit Opinion in this case and in fact the underlying Decision of the District Court, were both merely derivative of, and a perpetuation of, the Fifth Circuit's original error in the *Thomal* case. As stated by the Court in this case, "We are bound by this court's decision in *Thomal*". (See Fifth Circuit Opinion at Pg. 5, note 4.) Thus, the Circuit clearly felt that its Decision was controlled by *Thomal*, and thus chose to perpetuate the error it originally made in *Thomal*.

> Company in evaluating an employee's ability, skill and qualifications were inconsistent with the terms of the Agreement or were an improper application of the Agreement; and/or (2) secondly, he may assert that the Company discriminated against him because of race, color, religion, sex, or national origin in the evaluation process." (See *Houston Lighting & Power Company v. International Brotherhood of Electrical Workers*, at Page 6, quoting from *Thomal*, 71 F.3d at 184). (Appendix 1)

By making the foregoing statement, which fundamentally determined the Majority's ultimate Opinion in *Thomal*, and thus the Court's Opinion in this case, the Fifth Circuit in effect substituted its interpretation of the Contract for that of the Arbitrator. It was the Arbitrator that was hired by the parties to resolve the dispute, and interpret the Contract. He did so. It was totally inappropriate for the Fifth Circuit, regardless of whether or not it believed the Arbitrator to be correct in his interpretation, to substitute its interpretation of the Contract for that of the Arbitrator. See *United Paperworkers International Union v. Misco, Inc., supra.* Moreover, it was equally inappropriate for the Fifth Circuit, in this case, to perpetuate its prior error, made in *Thomal*, of usurping the Arbitrator's power, and substituting its own erroneous

judgment. There are two fundamental problems with the foregoing conclusion of the Fifth Circuit, which determined the Majority Opinion in the *Thomal* case, and thus controlled the Court's Opinion in this case. First, it is, at its core, a gross misinterpretation of the contractual language. Secondly, and more importantly, it was fundamental error for the Fifth Circuit to, under the guise of determining the contractual authority of the Arbitrator, indulge in a fundamental interpretation of the Contract that in fact was an interpretation for the Arbitrator.

Article IV, Section 7 of the underlying Collective Bargaining Agreement provides, in pertinent part, as follows:

> "Section 7. Seniority . . . In the event of promotions, layoffs, or a permanent reduction in the working force at a facility, where ability, skill and qualifications are equal, length of service at that facility shall govern. . . . The Company shall determine ability, skill and qualifications subject to an employee's right to assert a grievance under Article II."

Article II, as referred to in the foregoing provision, provides, in pertinent part:

> "Article II, Section 1. A grievance, as that term is used in this contract, means any dispute involving the proper application or interpretation of this Agreement, or a claim that an employee has been unreasonably and unjustly discriminated against.
> Article II, Section 4. . . . The sole function of the arbitrators shall be to determine whether Company or Union is correct with reference to the proper application and interpretation of this Agreement and the arbitrators shall not have any authority to change, amend, modify, supplement or otherwise alter in any respect whatsoever this Agreement, or any part thereof."

This case emanates from an underlying grievance filed, as specifically authorized by Section 7 of the Agreement, and in accordance with Article II of the Agreement. The underlying grievance was specifically the grievance contemplated by Section 7 -- a grievance over the Company's "determination" of an employee's "ability, skill and qualifications" in the circumstances of a layoff, and for the purposes of selecting employees for layoff. This was the grievance submitted to the Arbitrator, Harold Leeper, for resolution, and it was this dispute which the Arbitrator resolved.

While it is true that the initial grievances filed by the Union contesting these layoffs contained both broad claims attacking the entire procedure utilized by the Company for determining "ability, skill and qualifications", and individual claims of the individual Grievants, such as Sam Thornal and Larry Walker, who had been laid off out of line of seniority solely as a result of the Company's determination of his "ability, skill and qualifications", and while it is true that the first Arbitrators, such as Otis King, in the Thornal case, ruled in favor of the Company and against the Union, on the broad claim attacking the entire procedure, these rulings did not do away with the individual claims attacking the Company's determination of the individual employees' "ability, skill and qualifications". Those claims remained, and in both the Thornal case, and the Walker case, as well as many others, the respective Arbitrators addressed the individual claims of the employees, and their contention that the Contract had been violated because employees of lesser seniority but with whom they were at least equal to in terms of "ability, skill and qualifications", had not been laid off, while individuals such as Thornal and Walker had been laid off. This was the crux of the Grievances presented to the Arbitrators, and in both Thornal and Walker, the Arbitrators considered the case presented, and determined that the Contract had in fact been violated, by reaching the determination that the individuals, Thornal and Walker, were at least equal to, in

terms of "ability, skill and qualifications", at least one other employee of lesser seniority that had not been laid off. In each case, all that the Arbitrator did was to consider the employees' contest of the Company's determination of his "ability, skill and qualifications", and to conclude that the employee was right, and the Company wrong, with regard to the relative equality of his "ability, skill, and qualifications" with comparable employees of lesser seniority who were not laid off. As a result, and applying the clear language of the Contract, the Arbitrators ordered the employees reinstated.

These were neither complex nor unusual Grievances. Yet, the Fifth Circuit took these grievances, and these Arbitration Awards, and concluded that somehow the Arbitrators lacked the authority to resolve these disputes. Yet, these were the precise disputes that were before these Arbitrators: To determine whether or not an employee who had been laid off out of line of seniority could have fairly been so laid off in light of the applicable contract language, stating that where "ability, skill and qualifications" are equal", seniority shall govern." The only way for an Arbitrator to resolve such a dispute would be to indulge in a comparison of the Grievant with employees of lesser seniority who were not laid off, in terms of the contractual standard of "ability, skill and qualifications". This was all that these Arbitrators did, and in determining that they somehow lacked the authority to

do so, the Fifth Circuit grossly misinterpreted the contractual language.

The ultimate conclusion of the Fifth Circuit Majority Opinion in *Thornal*, and thus of the Fifth Circuit Opinion in this case, is that, even though the Contract clearly states, and the Circuit acknowledges that it so states, that an employee has a "right to assert a grievance" contesting the Company's determination of his "ability, skill and qualifications", the assertion of any such grievance could only be brought as "a claim that an employee has been unreasonably and unjustly discriminated against." This interpretation of the Contract by the Fifth Circuit is a complete misreading of Article II, Section 1 of the Agreement, and effectively denied Sam Thornal and Larry Walker, and potentially any other employee covered by this Agreement, of their right to present a grievance over "the proper application or interpretation of this Agreement". Clearly, Thornal, Walker and the Union had the right to "assert a grievance under Article II", and this necessarily means the entirety of Article II. In this regard, Article II clearly contemplates two types of grievances: First, "any dispute involving the proper application or interpretation of this Agreement", and secondly, "a claim that an employee has been unreasonably and unjustly discriminated against". Thornal's and Walker's grievances were clearly of the first type: They were grievances over the proper application of the Agreement with respect to them, with regard to the

Company's determination of their "ability, skill and qualifications". There was nothing whatsoever mysterious about the grievances, and they were clearly grievances contemplated by the Agreement. The effect of the Fifth Circuit Decisions in these cases, however, has been to completely deny both Thornal and Walker, as well as the Union, their right to bring these Grievances, as a result of a totally unexplained and complete misinterpretation of the grievance provision of the Contract.

As a consequence, we have a result here that is derivative of a clear mistake in contractual interpretation on the part of the Fifth Circuit. That much, alone, is a reasonable basis to reverse that decision. However, the more glaring problem with the Fifth Circuit Opinions in Thornal and Walker is that the Court indulged in such an analyses in the first instance. These Fifth Circuit Opinions wrongly limit, if not totally destroy, the grievance rights of employees covered by this Collective Bargaining Agreement; the clear violation of long-standing precedent of this Court, however, lies in the fact that the Fifth Circuit indulged in a comparative analysis between multiple contractual provisions, and thereby ultimately replaced its interpretation of the Contract, and thus its judgment regarding the merits of the underlying disputes, for those of the Arbitrators. This action of the Fifth Circuit is clearly not allowed by the decisions of this Court, and conflicts with decisions of all Circuit Courts, including the Fifth Circuit.

The fundamental question before the Circuit was merely whether or not the Award of the Arbitrator "drew its essence" from the Collective Bargaining Agreement. See *Delta Queen Steamboat Co. v. District 2 Marine Eng'rs Beneficial Ass'n,* 889 F.2d 599, 602 (5th Cir. 1989), *cert. denied,* 498 U.S. 853, 111 S.Ct. 148, 112 L.Ed.2d 114 (1990). In order to answer this question, all that the Circuit needed to do was to look at the grievance and arbitration provision of the Contract, and in particular, Article II, Section 4 thereof, as same is the only provision that places limitations upon, or otherwise defines, the role of the Arbitrator under this Collective Bargaining Agreement. Had the Fifth Circuit limited itself to such an examination, it would have seen that the only limitation upon the authority of the Arbitrator within this Contract, was that he or she did, "not have any authority to change, amend, modify, supplement or otherwise alter in any respect whatsoever this Agreement, or any part thereof." Manifestly, neither Arbitrator King, in Thornal, nor Arbitrator Leeper, in Walker, did any of these things. All that these Arbitrators did was to resolve disputes, squarely before them, over the Company's determination of employees' "ability, skill and qualifications", and the resulting layoff of those employees, out of line of seniority. Unquestionably, such disputes were contemplated by the parties by their inclusion in the contract in Article IV, Section 7, of the following language:

> "The Company shall determine ability, skill and qualifications *subject to an employee's right to assert a grievance under Article II.*" (emphasis added)

Moreover, if the parties expected such disputes to occur, then they clearly authorized arbitrators to resolve those disputes. That is all that Arbitrators King and Leeper did in these cases.

Moreover, had the Circuit limited its examination of the Contract to only that as necessary to resolve the sole question of whether the Arbitrators' Awards "drew their essence" from the Collective Bargaining Agreement, it would have seen that the Contract, in typical fashion, stated simply that "the sole function of the Arbitrator shall be to determine whether Company or Union is correct with reference to the proper application and interpretation of this Agreement. . ." Again, this is precisely what these Arbitrators did: They took and resolved the disputes placed before them, which were disputes over the "proper application and interpretation of this Agreement", determining that in one instance, in the Thornal case, that the Company was correct, with regard to the broad attack on the evaluation process, and in the other instances, with regard to both Thornal's and Walker's individual claims, that the Union was correct.

Unquestionably, had the Fifth Circuit limited its examination, as long standing precedent of this Court clearly directed it to do, to an examination of any limitation upon, and any definition of, the authority of the Arbitrator under the Agreement, the Court would have seen that both Arbitrator King and Arbitrator Leeper acted fully within their authority, and within the limitations on this authority, and seeing this, the Fifth Circuit's examination of the issues should have ended there. Unfortunately, the examination did not end where it should have; rather, the Circuit went beyond the limited examination that the precedent of this Court allows, and indulged in extensive contractual analysis, including comparative analysis of multiple contractual provisions, and ultimately reached conclusions that lead it to vacate the Arbitration Awards. Moreover, these conclusions were clearly the result of a disagreement with the Arbitrators as to their interpretation of the Contract, rather than being based upon any legitimate conclusion that the Arbitrators had exceeded their authority.

The contractual analysis engaged in by the Fifth Circuit, in both Thornal and Walker, was clearly wrong; the analysis was faulty and produced a complete misinterpretation of the Collective Bargaining Agreement. However, such is not where the real error of the Circuit exists in this case; its error was not in its faulty and poorly reasoned contractual analysis; its error was in indulging in the analysis in the first instance.

Acting under the guise of determining the question of whether or not Arbitrators' Awards "drew its essence" from the Collective Bargaining Agreement, the Fifth Circuit undertook the job of the Arbitrator; the Fifth Circuit interpreted contractual provisions which were presented to the Arbitrator for resolution, and should not have been reinterpreted by the Court of Appeals. In the final analysis, the result was a complete usurpation on the part of the Fifth Circuit Court of the authority of the Arbitrator, and an ultimate substitution by the Circuit Court of its judgment with regard to the merits of the dispute for that of the Arbitrator.

There can be no question but that this action of the Fifth Circuit is error, and clearly at odds with long-standing precedent of this Court. It was error on the part of the Fifth Circuit Majority Opinion in *Thornal*, and it is seemingly an even greater change for the Fifth Circuit, when given a second change to correct its clearly erroneous decision, to fail to do so in this case. Moreover, the analysis utilized by the Fifth Circuit, and the manner in which it has gone about its reasoning leading to its ultimate decision in these two cases, not only has had the effect of totally emasculating the grievance procedure of the Petitioner Union, but also, if allowed to stand, has the potential effect of doing the same to grievance procedures contained in Collective Bargaining Agreements throughout the Fifth Circuit. This Opinion of the Fifth Circuit is not only wrong, and totally contrary to

long-standing precedent of this Court, but it has the very dangerous and real potential of producing more and continual decisions which will effectively undermine the fundamental concept of arbitration as being the favored method of resolving labor disputes. This has already occurred at least once, as the Circuit has perpetuated its own erroneous decision in *Thornal* by reaching the same decision in Walker. If it has happened once, it will certainly happen again.

For this compelling reason, this case merits the consideration of this Court, and ultimately action of this Court reversing the decision of the Fifth Circuit.

CONCLUSION

Sam Thornal and Larry Walker were laid off from their jobs as a result of their employer's determination of their "ability, skill and qualifications". The Collective Bargaining Agreement that covered their employment with their employer authorized them to grieve this determination of their "ability, skill and qualifications". They and their Union did precisely that, and their grievances were ultimately presented to Arbitrators for resolution. The Arbitrators resolved the disputes, by concluding, in each of their cases, that their seniority rights had been violated because employees of lesser seniority than Walker and Thornal, but to whom Walker and Thornal were at least equal, in terms of

"ability, skill and qualifications", were not laid off. In each case, the Arbitrators reached this result by resolving the grievances filed by the Union and the individual employees contesting, as specifically authorized by the Contract, the Company's determination of their "ability, skill and qualifications". Both Arbitrators ordered the Grievants reinstated to their former position, as a remedy to the contractual breach on the part of the employer.

Lawsuits were filed by the Company seeking to set aside both Arbitration Awards, and ultimately, the disputes came before the United States Court of Appeals for the Fifth Circuit. Had the Fifth Circuit limited its examination of the Arbitration Awards in accordance with Supreme Court precedent, it would have concluded the Arbitration Awards should have been enforced. However, the Fifth Circuit assumed the role of the Arbitrator, and indulged in extensive analysis and interpretation of the contractual language, and the underlying dispute, and ultimately substituted its judgment for the judgment of the Arbitrators. This decision of the Circuit, being totally at odds with the teachings of this Court, cannot be allowed to stand.

Respectfully submitted,

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Counsel for Petitioner

LIST OF APPENDIX

1. Decision of the United States Court of Appeals for the Fifth Circuit in No. 94-20414; *Houston Lighting & Power Company vs. International Brotherhood of Electrical Workers*, entered on January 13, 1997.
2. Final Judgment issued by Judge David Hittner on April 1, 1996, in the United States District Court for the Southern District of Texas, Houston Division in Civil Action No. H-94-4362; *Houston Lighting & Power Company vs. International Brotherhood of Electrical Workers, Local No. 66*
3. Arbitration Award issued by Arbitrator Harold H. Leeper on July 26, 1994, in AAA No. A 70 300 0031 93; *Utility Fuels, Inc. -and- International Brotherhood of Electrical Workers, Local 66, AFL-CIO.*
4. Section 301 of the Labor Management Relations Act, 29 U.S.C. §185.
5. Section 203(d) of the Labor Management Relations Act, 29. U.S.C. §173(d)

APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-20414
Summary Calendar

HOUSTON LIGHTING & POWER COMPANY,

Plaintiff-Appellee,

VERSUS

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

January 13, 1995.

Before JONES, DeMOSS, AND PARKER, Circuit Judges.

PER CURIAM.*

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

Appellant International Brotherhood of Electrical Workers (the "Union") appeals the decision of the district court granting summary judgment in favor of appellee Houston Lighting & Power Company (the "Company") in a dispute stemming from an arbitrator's award in favor of the Union. Finding no error below, we affirm the judgment of the district court.

BACKGROUND

In 1992, the Company[1] conducted a reduction in force which resulted in the discharge of several hundred workers, including Larry Walker, a member of the Union and a mechanic working for the Company. As an exercise of the Company's management rights under the collective bargaining agreement ("Agreement"), the Company was entitled to evaluate its employees prior to its reduction in force. In so doing, the Company conducted skill assessments which ranked all of its employees based on ability, skill, and qualifications. Pursuant to these rankings, employees were categorized as either "above average," "average," or "marginal." The reduction in force was performed by first discharging

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[1] Utility Fuels, Inc. ("UFI") and HL&P are former subsidiaries of Houston Industries, Inc. In the fall of 1993, UFI merged into HL&P. We will refer to UFI and HL&P collectively as the "Company".

employees who had received a "marginal" rating in order of reverse seniority. The next employees to be discharged were employees who received an "average" rating, again in order of inverse seniority, followed by employees who received an "above average" rating in inverse seniority. This was done until the requisite number of discharges for the reduction in force was achieved.

Walker was given a "marginal" rating. He was discharged. The Union filed a grievance on his behalf.[2] In its grievance, the Union complained that the Company had violated the seniority provisions of the Agreement by retaining employees who had less seniority than Walker while discharging Walker.

Pursuant to the terms of the Agreement, the Union's grievance was submitted to arbitration. In considering the parties' dispute, the arbitrator concluded that the Company had improperly given Walker a "marginal" rating and that doing so "constituted unreasonable discrimination against [Walker]." R.44. Immediately after quoting Justice Stewart's now well

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[2] The Union also filed a grievance on behalf of Sam Thornal. The similar facts of Thornal's case are set forth in *Houston Lighting & Power Co. v. International Bhd. of Elec. Workers, Local Union No. 66*, 71 F.3d 179 (5th Cir. 1995). Several of the issues decided by this court in Thornal's case are dispositive of issues presented in the instant appeal.

known statement in *Jacobellis v. State of Ohio*[3], the arbitrator stated that "the discrimination practices against [Walker] was (sic) so palpable that it (sic) cannot be overlooked or excused." R.44. The arbitrator proceeded to award judgment in favor of the Union and ordered that Walker receive back pay and reinstatement.

The Company filed suit in district court seeking to set aside the arbitrator's award. The district court granted the Company's motion for summary judgment. The Union now appeals.

DISCUSSION

We review a district court's grant of summary judgment vacating an arbitration award *de novo*. *See Houston Lighting & Power Co. v. International Bhd. of Elec. Workers, Local Union No. 66*, 71 F.3d 179, 181 (5th Cir. 1995), *cert. denied*, ____ U.S.____, 117 S.Ct. 52 (1996). "When an arbitrator exceeds his authority, vacation of the judgment is appropriate." *Id.* at 182 (citing *United States Postal Serv. v. American Postal Workers Union*, 922 F.2d 256, 258 (5th Cir. 1991)).

The Union claims that the arbitrator did not exceed his authority when he determined that the

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[3] 378 U.S. 184, 197, 84 S.Ct. 1676, 1683 (1964) (Stewart J., concurring) (he may not be able to define what pornography is, but he knows what it is when he sees it).

Company had improperly rated Walker. This precise issue has been addressed by this circuit in a dispute between the same parties under the same Agreement concerning an arbitrator's award in favor of discharged employee, Sam Thornal. *See Houston Lighting & Power Co.* (hereinafter "*Thornal*").[4] In *Thornal*, as here, the arbitrator had concluded that the Company had incorrectly rated the discharged employee. Relying on the language of the Agreement which provides that "[t]he Company shall determine ability, skill and qualifications, subject to an employee's right to assert a grievance," the Union argued in *Thornal*, as it does here, that the arbitrator was well within the authority granted to him under the Agreement to re-determine an employee's rating. This court disagreed:

> "The phrase "subject to an employee's right to assert a grievance" does not mean that the Company loses its right to make the qualification determination once an employee asserts a grievance. That phrase does not confer upon the arbitrator the right to make a *de novo* determination of the

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[4] Although the Union complains that *Thornal* was decided incorrectly, this panel does not have the authority to overrule a prior controlling decision of this circuit. *See Sierra Club v. Shell Oil Co.*, 817 F.2d 1169, 1175 (5th Cir.), *cert. denied*, 484 U.S. 985 (1987). We are bound by this court's decision in *Thornal*.

> employee's qualification. . . [N]othing in the Article II, Section I definition of "a grievance" can be rationally interpreted to include the concept that a grievance includes a claim that an employee has been unfairly or incorrectly evaluated for lay off. . . . *The right to make the ultimate determination remains with the Company.*
>
> . . . *The Company has the exclusive right to make the employee qualification determinations. Nowhere in this Agreement does it state that redetermination shall be made by the arbitrator.*

Thornal, 71 F.3d at 184 (emphasis added). It is clear from *Thornal* that the arbitrator did not have the authority to substitute its own rating of Walker for the Company's rating of Walker. The court in *Thornal* also stated:

> The phrase "subject to an employee's right to assert a grievance" means that the employee may assert one or both of two contentions: (1) first he may assert that the system and procedures used by the Company in evaluating an employee's ability, skill and qualifications were inconsistent with the terms of the

> Agreement or were an improper application of the Agreement; and/or (2) secondly, he may assert that the Company discriminated against him *because of race, color, religion, sex or national origin in the evaluation process*.

Id., at 184 (emphasis added). Therefore, in considering Walker's grievance, the arbitrator had the authority to consider (1) whether the Company's ranking of Walker was inconsistent with the terms of the Agreement and/or (2) whether the Company had discriminated against Walker. With regard to whether the Company's ranking was inconsistent with the terms of the Agreement, the arbitrator concluded that the ranking was not inconsistent with the terms of the Agreement and stated that the Company "did not violate the Collective Bargaining Agreement when it utilized the [ranking] procedure in conducting the reduction in force." R.59.

However, in considering whether the Company had discriminated against Walker, the arbitrator stated that Walker's "marginal" rating was a result of "unreasonable discrimination." R.44. Implying that he could not define exactly what kind of discrimination occurred, the arbitrator merely concluded that "the discrimination practiced against [Walker] was so palpable that it cannot be overlooked or excused." R.44.

As the district court stated, "It takes more than a vague feeling that discrimination occurred for the award to draw from the essence of the [Agreement]. If the arbitrator is unable to define the form of discrimination, then he has exceeded the authority granted him by the [Agreement]." There is no evidence in the record that Walker was discriminated against based on race, color, religion, sex, or national origin. Neither is there evidence that Walker was discriminated against based on his Union activities. In fact, the arbitrator found that "there was no evidence that [Walker's] rating was reduced because of his Union position and protective activities." R. 45.

CONCLUSION

As was the case in *Thornal*, by performing his own re-evaluation, the arbitrator went beyond the scope of his authority and beyond the essence of the Agreement. For the foregoing reasons, we AFFIRM the judgment of the district court.

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HOUSTON LIGHTING & POWER CO.	§	
Plaintiff	§	C. A.
	§	NO.
v.	§	
	§	94-4362
INTERNATIONAL BROTHERHOOD OF	§	
ELECTRICAL WORKERS, LOCAL NO. 66	§	
Defendant.	§	

FINAL JUDGMENT

The Court having granted plaintiff's motion for summary judgment hereby

ORDERS that judgment be granted in favor of the plaintiff. The arbitration award is VACATED.

This is a FINAL JUDGMENT.

SIGNED at Houston, Texas, on this 1 day of April, 1996.

SIGNED: s/DAVID HITTNER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HOUSTON LIGHTING & POWER CO.	§	
Plaintiff	§	C. A.
	§	NO.
v.	§	
	§	94-4362
INTERNATIONAL BROTHERHOOD OF	§	
ELECTRICAL WORKERS, LOCAL NO. 66	§	
Defendant.	§	

ORDER

Pending before the Court is the motion for summary judgment (Document #8) filed by defendant and the motion for summary judgment (Document 9) filed by plaintiff. Having considered the motions, the submissions on file, and the applicable law, the Court determines that the defendant's motion should be denied and the plaintiff's motion should be granted.

Houston Lighting and Power Company ("HL&P") filed this suit against the International Brotherhood of Electrical Workers, Local Union No. 66 (the "Union"), seeking to set aside an arbitration award. Both parties to this action have filed motions for summary judgment and both parties agree that there are no disputed facts. Accordingly, the only issue presented to the Court is one

of law - whether or not the arbitration award should be enforced.

FACTUAL OVERVIEW

During the spring, 1992, HL&P and Utility Fuels, Inc. ("UFI")[1] conducted a layoff of several hundred employees. The Union filed numerous grievances on behalf of some of the laid off employees, including Larry Walker, a mechanic at HL&P's Limestone facility. The substance of the Union's grievance was that the method by which UFI selected Walker to be laid off violated the Collective Bargaining Agreement ("CBA") between the Union and HL&P. Walker's grievance was arbitrated on March 30, 1994 and on July 26, 1994, Arbitrator Harold Leeper entered an award sustaining the Union's grievance. The award ordered that Walker receive backpay and reinstatement. Instead of complying with the terms of the award, HL&P chose to file this suit in which it argues that Arbitrator Leeper's decision is flawed in numerous respects.

THE COLLECTIVE BARGAINING AGREEMENT

Article IV, Section 7 of the CBA states: "In the event of promotions, layoffs, or a permanent reduction of

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[1] Utility Fuels, Inc. ("UFI") and HL&P are former subsidiaries of Houston Industries, Inc. In the fall of 1993, UFI merged into HL&P. Throughout this Order, the Court shall refer to UFI and HL&P collective as "HL&P".

the working force at a facility, where ability, skill and qualifications are equal, length of service at the facility shall govern." And further, "The Company shall determine ability, skill and qualifications, subject to an employee's right to assert a grievance under Article II."

Article II of the CBA sets out the procedure for filing a grievance. A grievance is defined as "any dispute involving the proper application or interpretation of this Agreement, or a claim that an employee has been unreasonably and unjustly discriminated against." Should the grievance proceed to arbitration, the function of the arbitrator, as defined in section 4, is to "determine whether Company or Union is correct with reference to the proper application and interpretation of this Agreement . . . [and not to] change, amend, modify, supplement or otherwise alter in any respect whatsoever this Agreement, or any part thereof."

THE ARBITRATION AWARD

The specific issue decided by the arbitrator was "Whether or not the Company violated the Collective Bargaining Agreement, and specifically Article IV, Section 7 thereof, in the manner in which it conducted the reduction of force in the Spring of 1992, and whether or not the company violated the Collective Bargaining Agreement in laying off Larry Walker out of line of seniority." Award at 2.

With regard to the first issue, the manner in which HL&P conducted the layoffs, the arbitrator found that the

procedure used did not violated the CBA. However, as to the second issue, the arbitrator found that HL&P's lay off of Walker violated the CBA.

In his award, the arbitrator exhaustively reviewed the SPP[2] applicable to Walker. He compared Walker's rating on the SPP to his 1988 appraisal and noted several inconsistencies He also noted that several other mechanics received significantly higher ratings on their SPP whereas their appraisals were comparable to that of Walker. Award at 5-8. None of the persons evaluating Walker compared his SPP to his appraisal, relying on the Human Relations Manager to do that check. However, Human Relations Manager did not compare the two measures and instead relied on his own recollection of Walker's performance. The arbitrator found that this conflicted with HL&P's procedures. The arbitrator also considered the evidence presented by HL&P in support of its position that Walker was a disciplinary problem and determined it to be inadequate. Award at 17. The arbitrator further noted that the only two mechanics laid off were two Union stewards. In sum, the arbitrator found that HL&P did not comply with its own internal procedures in evaluating Walker and that this constituted unreasonable discrimination. Award at 19. The arbitrator

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[2] The SPP (Special Performance Profile) is a worksheet used by HL&P in order to assess the abilities of its employees such that it would reasonably decide who should be terminated.

sustained the grievance and ordered reinstatement with backpay.

LEGAL ANALYSIS

"Judicial review of an arbitration award is extremely limited." Delta Queen Steamboat Co. v. District 2 Marine Eng'rs Beneficial Ass'n, 889 F.2d 599, 602 (5th Cir. 1989), cert denied, 489 U.S. 853 (1990). An arbitrator's award should be upheld regardless of whether the Court agrees with the decision, so long as the decision "draws its essence from the contract." United Paperworkers Int'l Union v. Misco., Inc., 484 U.S. 29, 36 (1987). A decision draws its essence from a contract when it has a basis that is at least rationally inferable from the language or purpose of the contract. Local Union 59, Int'l Brotherhood of Elec. Workers v. Green Corp., 725 F.2d 264, 268 (5th Cir.), cert. denied, 469 U.S. 833 (1984).

However, a court may review whether the arbitrator acted within the scope of his authority, although all doubts should be resolved in favor of the arbitrator. United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960). Further, an arbitration award is also subject to review for "manifest disregard of the law." Trafalgar Shipping Co. v. International Milling Co., 401 F. 2d 568, 572-73 (2d Cir. 1968).

An arbitrator's authority is limited by the terms of the arbitration agreement and to the issues presented him. Piggly Wiggly Operators Warehouse, Inc. v. Piggly Wiggly Operators Indep. Truck Drivers Union, Local No. 1, 611

F.2d 580, 583 (5th Cir. 1980). The broadest submission of the issues was that of the Union. There the Union stated the issue as:

> Whether or not the Company violated the Collective Bargaining Agreement, and specifically Article IV, Section 7 thereof, in the manner in which it conducted the reduction in force in the Spring of 1992, and whether or not the Company violated the Collective Bargaining Agreement in laying off Larry Walker out of line of seniority?

However, in his award, it is clear that the arbitrator did not limit his consideration to these two issues. Rather, the arbitrator assessed whether or not HL&P's decision to rate Walker as Marginal was proper. In order to do this, the arbitrator essentially performed a recalculation of Walker's SPP rating.[3] While the arbitrator did not actually arrive at a new rating, he did find that the current rating was unwarranted. Based on his finding that Walker's SPP rating was unjustified, the arbitrator further concluded that the unjustified rating must have been the result of discrimination, in violation of the CBA.

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[3] Specifically, the arbitrator stated, "each element of each SPP rating form will be reviewed, and the scores of each of the ten mechanics at Limestone will be compared with the evidence in the record of this proceeding in order to reach a decision as the propriety of Grievant's 'Marginal' rating." Award at 4-5.

In resolving that Walker had been discriminated against by HL&P, the arbitrator relied on his view that HL&P had not followed its own procedures in evaluating Walker. This failure by HL&P was the sole basis for the arbitrator's finding of discrimination. However, failure to correctly follow internal procedures is not a form of discrimination. E.g., Risher v. Aldrich, 889 F.2d 592, 597 (5th Cir. 1989) (holding that an employer's disregard of performance appraisals does not establish discrimination).

In order for there to be discrimination against Walker, there must be some distinguishing characteristic that motivated the activity. Yet the arbitrator reached no such conclusion. In fact, the arbitrator explicitly rule out the only possibly articulated basis for discrimination - Walker's union activity - when he stated "there was no evidence that Grievant's rating was reduced because of his Union position and protective activities . . . ." The arbitrator based his decision on his sense that Walker had been unfairly treated. However, the arbitrator is required to limit his consideration to the terms of the contract and a vague sense that unjust conduct took place amounts to a substitution of his judgment for that of HL&P as to Walker's abilities. Such "industrial justice" does not draw its essence from the CBA and clearly violates the limited authority granted the arbitrator.

The arbitrator illuminated his finding by likening it to Justice Stewart's famous statement, that while he

cannot define pornography, he knows it when he sees it.[4] However, in this case, the arbitrator lacks the luxury of simply identifying the existence of discrimination without specifying the type.[5] It takes more than a vague feeling that discrimination occurred for the award to draw from the essence of the CBA. If the arbitrator is unable to define the form of discrimination, then he has exceeded the authority granted him by the CBA.[6] Based on the foregoing, the Court

ORDERS that defendant's motion for summary judgment (Document #8) is DENIED and plaintiff's motion for summary judgment (Document #9) is GRANTED.

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[4] Jacobellis v. State of Ohio, 84 S. Ct. 1676, 1683 (1964) (Stewart, J., concurring).

[5] In contrast, had the arbitrator found that HL&P discriminated against Walker on the basis of race, sex, or some other recognizable characteristic, the Court may have been obligated to uphold his decision regardless of whether the Court disagreed with his assessment of the merits of Walker's claim as such a determination would in all likelihood draw its essence from the CBA.

[6] See also Houston Lighting & Power Co. v. International Bhd. of Elec. Workers, Local Union No. 66, 71 F.3d 179, 183-84 (5th Cir. 1995). In Houston Lighting, the Fifth Circuit vacated an arbitration award based on the same CBA at issue in this case. Specifically, the court held that the arbitrator re-evaluated the grievant's credentials rather than accepting the evaluation performed by HL&P and that this conduct went beyond the scope of the arbitrator's authority.

SIGNED at Houston, Texas, on this 1 day of April, 1996.

SIGNED: s/DAVID HITTNER
United States District Judge

APPENDIX 3

OPINION AND AWARD

In the Matter of Arbitration Between	*	
UTILITY FUELS, INC. Houston, Texas	*	AAA No. A70300003193
and	*	Layoff: Larry Walker
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 66 Houston, Texas	*	

* * * * * * * * * * * * * * *

A hearing was held in this matter in Houston, Texas on March 30, 1994. Post-Hearing Briefs were timely filed by the Parties, and were received by the Arbitrator on June 3, 1994.

ARBITRATOR: Harold H. Leeper, selected by the Parties under AAA procedures.
6256 Glennox Lane
Dallas, Texas 75214

FOR THE COMPANY: L. Chapman Smith, Esq.
Matthew P. Eastus, Esq.
Baker & Botts
1 Shell Plaza
Houston, Texas 77002-4995

FOR THE UNION: Robert W. Rickard, Esq.
1515 Jefferson
Houston, Texas 77002

ISSUE

Because the Issue in this case was not agreed upon by the Parties prior to the hearing, the Arbitrator made a special effort to give each Party an opportunity to permit its version of what the Issue should be. After twenty pages of pending statements by the Parties, the Arbitrator asks: "Is it O.K. to frame it this way? Did the Company violate the Contract when it laid off the Grievant? Is that a general enough statement to comprehend all of the things that we will talk about?" The Company Counsel answered "I'll never concede it, but that's the way it has been framed by previous arbitrators." The Union Counsel said "I have no problem with that."

In its post-hearing brief, the Company presented its version of the Issue as follows: "Did the Company unreasonably and unjustly discriminate against Grievant by terminating him while retaining a less senior mechanic?" referring to Article II, Section 1 of the Agreement.

In its brief, the Union stated the Issue as follows: "Whether or not the Company violated the Collective Bargaining Agreement, and specifically Article IV, Section 7 thereof, in the manner in which it conducted the reduction of force in the Spring of 1992, and whether or

not the Company violated the Collective Bargaining Agreement in laying off Larry Walker out of line of seniority? If any violation of the Collective Bargaining Agreement is found, then what is the appropriate remedy?"

The Arbitrator prefers to limit his consideration, based on his understanding of his jurisdiction, to the language of the Collective Bargaining Agreement. Since the Union's statement of the Issue is comprehensive and includes the discrimination element to Article II, it is adopted by the Arbitrator as the Issue to be decided in this case.

BACKGROUND

In the Spring of 1992 Utility Fuels had a significant layoff, which was conducted concomitantly with a similar layoff by its sister Company, Houston Lighting and Power. Both non-bargaining unit and bargaining unit employees were involved. The companies arranged the non-bargaining unit personnel in each classification from best to worst and then laid off in reverse order in ranking. The Companies adopted a modification of this procedure for members of the Bargaining Unit. Utility Fuels evaluated its Bargaining Unit employees in each classification in three categories: "Above Average," "Average" and "Marginal," and then laid off in reverse order of seniority within each classification. It appeared that the creator of the three-tier grouping believe (sic) that it was consistent with the contractual seniority provision.

Utility Fuels had two plants, Limestone and Parish. There was a total of 10 grievances resulting from the lay-offs at the HL&P and UFI plants, of which eight arbitration awards have been received prior to the instant decision. All four awards in the H. L. & P Company, (Arbitrators Fox, Rezler, Nicholas and Baroni) denied the grievances, finding no violation of the CBA. All four of the CFI (sic) grievances, two at Limestone (King and Carnes) and two at Parish Plant (Massey and Wolitz) found the Company's application of the SPP evaluation procedure discriminatory; all four of those employees were ordered restored with full back pay.

WERE THE EIGHT AWARDS RES JUDICATA?

The first award, by Arbitrator M. J. Fox found that the system utilized by the Company did not violate Article IV, Section 7 of the Agreement: "In the event of promotions, layoffs, or a permanent reduction of the working force at a facility, where ability, skill and qualifications are equal, length of service at that facility shall govern." Later in the Section, "The Company shall determine ability, skill and qualifications, subject to an employee's right to assert a grievance under Article II." Subsequent Arbitrators in the H. L. & P cases considered this issue to be Res Judicata and not subject to subsequent review by them. Arbitrator King declined to accept the Res Judicata finding, as the two employers were separate

legal identities, even though they later merged; however, he agreed with the conclusions of Arbitrator Fox as to the propriety of the SPP system, and upheld it. Thereafter, all Arbitrators approved the Companies' use of the SPP evaluation system, finding it not impermissible under the language of the Contract quoted above.

This Arbitrator concurs with the conclusions of the eight arbitrators, and concludes that UFI did not violate the Collective Bargaining Agreement when it utilized the SPP procedure in conducting the reduction in force at the Limestone plant in the Spring of 1992.

BURDEN OF PROOF

Arbitrator Fox found, and all seven subsequent Arbitrators agreed with him, that the "shifting burden of proof" system is applicable in these cases. Thus, when the Union showed that Grievant was laid off while junior employees in his classification were retained, the burden shifted to the Employer to show that the employees who were retained were superior in "ability, skill and qualifications" to the Grievant.

This Arbitrator concurs with this legal conclusion of the eight Arbitrators, and concludes that the Union met its burden of making a prima facie case, thus shifting the burden to the Company to justify its action in laying off Grievant, one of the senior employees in his classification,

while retaining several junior employees, based on their alleged superior ability, skill and qualifications.

DID THE COMPANY'S SPP EVALUATIONS VIOLATE THE AGREEMENT?

There remains the question, considered by all eight Arbitrators and decided on the basis of the individual facts in each grievance, whether the Company's application of the SPP evaluation procedure to those Grievants violated the Agreement when it laid off those Grievants out of the line of seniority. As in all of the earlier cases, a painstaking inspection and analysis of the details of the various elements of the SPP evaluation forms is required to ascertain whether Grievant in this case was "unreasonably and unjustly discriminated against." Accordingly, each element of each SPP rating form will be reviewed, and the scores of each of the ten mechanics at Limestone will be compared with the evidence in the record of this proceeding, in order to reach a decision as to the propriety of Grievant's "Marginal" rating.

Difference Between FPP (sic) Ratings And 1988 Performance Appraisals

The Union's principal challenge to the reasonableness of the SPP made on Grievant on 1992 was that it was inconsistent with the 1988 performance

appraisal which had been prepared by his former Supervisor, for whom he had worked for several years.

The Company's first witness was former Human Relations Manager Webb, who since the layoff had retired and is serving the Company as a consultant and trainer, who developed the instructions for the Special Performance Profile program. On direct examination, he described the system he had developed including the training he performed, in order to evaluate the current SPP ratings which were used for use in determining which ones should be retained for future employment, and which ones should be laid off.

On cross examination he was vigorously questioned concerning the apparent differences in the ratings given the Grievant compared with other employees with whom he was in competition for layoff, mainly the 1988 Performance Appraisal and the 1992 SPP markings. He conceded that he was the staff man who reviewed all the forms rated by supervisors and approved by the Plant Managers, and that he personally compared those scores on the SPPs with the Performance Appraisals in the employees' personnel files; apparently none of the 1988 forms had been made available to raters or reviewers when they were preparing the SPPs. He said he found all of the SPPs to be consistent with the ratings in the 1988 appraisals. Asked how he arrived at the conclusions, he said he wished he had not used a "judgmental term" such as "marginal" instead of a "C." He admitted that the

purposes of for the SPP system and the Performance Appraisal system were entirely different: The Appraisals were to be used as a positive means to encourage employees to do well, and they were also to be used for developmental purposes for the future. However, the SPP ratings were only to determine who would be laid off. He noted that Grievant was the lowest performer of the ten mechanics, but "that doesn't mean there was a vast difference between the employees rated 18 and the Grievant who was rated 4." He said they instructed Supervisors to "force rate" employees so that Management could make a distinction between them, and the range ran from 16 to 13 at the top to around 7 or 8 at the bottom. But he overlooked the rating of Grievant, which was 4. Asked what about these ratings were comparable, and he said that he had reviewed the personnel files, and what he saw in the SPCs (sic) were trends in employees' performance. Asked about the comparison of Carpenter who had a 13 and Grievant who had a 4 on the SPP, whereas they had almost exactly the same Appraisal ratings 4 years before, he said "Carpenter was a good employee and Grievant had a trail of discipline and a trail of problems in his performance."

Asked how he compared Grievant and Towles, he said the Performance Appraisals showed only one difference: Towels was rated a little higher on one element, job motivation. Asked why he brought in "all this disciplinary stuff" regarding Grievant when in fact

Towles had been placed on more significant disciplinary steps than Grievant, he answered, "My recollection is prior to 1988." Asked, "Well most of what you brought in on Grievant was prior to 1988." Interestingly, Company Counsel responded "No" but did not object to the question or otherwise clarify his problem.

On this comparison between Grievant and Towles, the Arbitrator notes that the Company Exhibit 13 shows that Grievant's file contained several notations of oral counselings and other matters, as follows: Two in 1987, two in 1988, six in 1989, and one in 1990. Two of these were first step disciplinary actions and never proceeded to the second step; the others were mere notations which never resulted in any discipline.

Asked why he didn't recognize that Towles received counseling twice in January 1989, twice in February '89, once in July '89 and twice in October and twice in November 1989, his answer was, "He had also improved his performance." He said he knew Towles had "turned it around."

As far as comparing the Grievant with Dickey, he agreed that Grievant was rated higher than Dickey on the 1988 Performance Appraisal, but Dickey got 18 and Grievant got only 4 in 1992. He said this was not inconsistent with what he saw on the SPP. He admitted that the instructions to all supervisors said an employee was rated significantly differently from any record of recent performance appraisal, the rater needed to explain

these differences in the Comment lines. This is contained in Company's Exhibit 1, page 259, Explanation of the nature of changes must be made in Comments section, and if performance has changed, specific examples were required. The Arbitrator notes that the SPP raters did not have these 1988 performance appraisals, and apparently Mr. Webb took full responsibility for consistency between the two evaluations.

He was asked how the 1988 appraisal showed Grievant was well liked and gets along with everybody, while the SPP said he aggravates everybody. He said he noted that difference, particularly because Grievant was the Union Steward, but did not consider that inconsistent, because his personal knowledge of Grievant indicated that these kinds of things did occur. "So they were consistent with reality." He overlooked the fact that there was no explanation on the SPP form which would have been impossible because the Foreman who performed the SPP rating did not use the Appraisal or even see it.

Asked about the Foreman's comment on Grievant's SPP that said "Leon used to see how he could push individuals, which can become harassment," he said he thought the Foreman must have mistakenly put Leon Bardin's name down, but he knew that the comment pertained to the Grievant. And he thought it was O.K., and never asked Leon about it.

From Mr. Webb's testimony, it is obvious that he did not enforce his own rules regarding documenting

significant changes from the last Performance Appraisal, and also that he relied to a great extent on his own observations and opinions of the performance of employees between 1988 and 1992. He never did explain why the Company presented at the hearing all those documents from Grievant's personnel folder, but failed to recognize that Towles had a worse disciplinary record, and instead only introduced on (sic) "attaboy" form letter commending Towles. This official's testimony did not provide any support for the Company's contention that the Grievant had not been discriminated against in his SPP rating which led to his layoff.

The next witness had been Manager of Operations at Limestone for about nine years. He reviewed the evaluation process and kept the President of the Company advised of the problems and recommendations for both UFI facilities at Limestone and Parish to Limestone and they reviewed the SPP's for all the Limestone employees. They reviewed the documents which are relevant to this case, for the mechanics. He looked for consistency in the ratings, and comments of the Foremen to make sure there weren't any biased feelings. He said he knew the employees at Limestone, including Grievant, and agreed with the SPP rating of Grievant as a "marginal" employee. He then handed these to the Human Relations Manager for review and comment and learned later that some of them had been returned for additional comments. (None of which apply to the Grievant). At the time he reviewed

the SPP ratings, he did not know how many people were going to be laid off; that decision was reached a month later. He explained the contents of Company Exhibit 14 regarding the reduction in body count for mechanics at Limestone which showed the number of men which would have to be laid off in order to accomplish Management objection of downsizing for the future. This resulted in a conclusion that 2.396 mechanics were surplus, and they had to reduce the workforce by two Journeymen mechanics. They turned out to be Leon Bardin and Larry Walker, after they went back and reviewed the evaluation worksheets, Company Exhibit 3.

On cross examination he said there was one "average" member of the bargaining unit that was severed and one "marginal" kept his job. He said the Limestone mechanics had different type of work assignments: Millwrighting, welding, working on heavy equipment, fabricating, riveting, etc., and all journeymen mechanics should be able to perform those functions. However, different men have greater strengths than others in certain areas. Which man was assigned to which job was left up to the first line supervisor. However he was familiar with the special skills of the men at the time the SPP's (sic) were made. He had a reasonable feel for which employees were better with heavy equipment, from comments made by various workers in supervision, and from what he witnessed on the job. He knew that his best Millwrights were Dickey, Simms and Grievant. He also

knew that because the Grievant was an experienced Millwright; that's why he was hired; further he had worked for the Construction Co., which built the facility, so he was very familiar with the system.

Asked about the system utilized to rate the various employees, he said they brought in as many supervisors as he could get into the room and make a group review of the employees in each classification.

He said he did not consider the performance profiles with prior appraisals of the employees. In the nine years he was Limestone he said the Grievant was the Union's Steward, and he had dealings with Grievant, as did the General Foreman and the Supervisors. In Grievant's capacity as a Steward he said he did have more dealings with Grievant concerning complaints of one kind or another than any other employee in the plant, but he would expect that of a Union Steward.

The Arbitrator's assessment of the Plant Manager's testimony did not strengthen the Company's argument that there was no discrimination against Grievant. If anything, it seemed that Management did not make any effort to document their decisions in terms of observed problems and performance in the past 4 years.

The next witness for the Company was Buck Yates, who was Operations Manager at Limestone for a few months prior to the layoff, and prior to that was Operations Manager in the Parish plant. The planning of the reduction in force included the determination of what

functions could be eliminated and the process of evaluating employees. He received training from the Human Relations Manager in the evaluation process in terms of providing training to the Limestone Supervisors. He participated in the meeting of supervisors on the SPP ratings at Limestone on February 21, 1992. There were five electrical maintenance Foreman (sic) and the mechanical maintenance foreman, Mike Brown. He handed out blank forms for the scoring which they were to execute. After all had finished their ratings, they discussed the rankings of the group, took each one of the evaluations and read the comments and the markings he put on there. Only one comment came from the group, from Childs who commented that there would be a marking up because of the experience one of the mechanics had, but he did not remember the name. He said he didn't know the mechanical employee because he had only been there a short time, but he did know the supervisors and foreman and listened to what they had to say. About the time they were putting the mechanics names on the board, he stepped out of the room to take a telephone call, and when he returned the group were through with mechanical and electrical groups, so he never saw the mechanics' names on the board. He signed all the SPP's(sic). He said he and Mr. Finley went over the Bargaining Unit SPPs, because he held the same position he held at Limestone when he came. Later he received some of the SPP's (sic) back for additional comments, and

took them back to Mike Brown to complete. He said Mr. Webb told him the appraisals needed some more documentation but after Brown added some comments, he returned them to Mr. Finley or Mr. Webb. He attended a meeting at which Mr. Finley presented to the Company's executive management, when everything was approved. He said they didn't know who was going to be severed, but knew that two mechanics were to be severed.

On cross examination, he said he was not in the room when Grievant was told he was going to be severed, but saw Grievant after he had met with Mike Brown. He said his only function at the general supervisors' meeting was adding up the numbers. However, none of the comments on any of the forms were his, and the comments on the mechanical group were written by Mike Brown, in order to justify the numbers he had recorded. He relied on Finley's knowledge of the employees and their performance.

Since Mr. Yates did not know anything about the mechanics he rated, and he relied on Mr. Brown and Mr. Finley's rating, his testimony made no contribution to the resolution of this dispute.

The final witness in the Company's case in chief was Mike Brown, the Mechanical Supervisor who rated the mechanics. He had been at the plant for eight years, and had been a second line supervisor since 1987, when he managed the Maintenance Department. Sam Loper had been the Mechanical Supervisor; was discharged six

months before the layoff, and he assumed the additional responsibility of the first-line supervisor for the mechanics. He said he was trained by Mr. Yates on the SPP process, and attended the supervisors meeting on February 21 at which the SPPs were filled out. Since most of the morning was spent with operations employees, he had time to arrange his thoughts as to how he wanted to perform the evaluations. He subdivided the first category. Evaluations of Performance and Present Job Functions into five subsections: Welding, Fabrication, Millwright, Heavy equipment operations and heavy equipment maintenance, and Rigging. On each of these items he rated each mechanic zero for low average, one for average and two for excellent. When he added the points he came up with an overall score for the first element of the form.

Mr. Brown discussed the various employees and the points he had given them on the other elements of the forms which related to motivation and communication in other elements which were less important in terms of number of points. On SPP he said he made a mistake when he put Leon's name on the comments, and then corrected his mistake later on, so he may have put Larry's on Leon's and Leon's on Larry's, and corrected Leon's with incorrect Larry's. He said basically the same sentence on both forms, and said on Grievant's form he tried to see how far he could push individuals in teasing, with some harassment.

In the evaluation of the last item, he gave Moore two because he was always volunteering and Carpenter a plus one for excellent attendance. Dickey, Hackett, Sims (sic), Towles, Sanders and Allen received zero. Barden (sic) got a negative one for his excessive absenteeism and Grievant a negative one for racial comments, "likes to agitate or initiate others in joking situations." Later on, he was given a list of employees who would be severed, and notified Grievant in his office. It surprised Grievant, and he became concerned over Grievant's health, as his face got red. Soon thereafter he left and Aubrey sent him to the consultant company.

On cross examination he said the Grievant was clearly surprised as he did not expect to be laid off. He said Loper had been fired because there was concern about his supervisory skills and favoritism, and the incident was brought to the Company's attention by the Grievant, although he felt that all the facts weren't presented by the Grievant at that time. He did not agree with Union Counsel that Dickey, Simms and Walker did most of the millwrighting work, because they didn't do much millwrighting work which was not a routine occurrence, as they didn't move equipment very much. Asked about his entry on Allen's form which appeared to be "slow fabrication" he said he (sic) was shop fabrication, but he conceded that it looked like slow. Asked by the Arbitrator if he wanted to change his testimony to "slow", he said "it could have been. I don't know. It could have

been his fabrication skills were slow or average in shop fabrication. I don't recall."

He was asked on Towle's (sic) form if he gave the employee maximum points for his fabrication and welding and then gave no bonus marks somewhere down on the form, and whether that seemed like double credit or did that occur to him. He said, "It did not occur to me." Reminded that he had given Moore four out of five points on the job related emotional characteristics, according to his willingness to go beyond routine requirements of recurring job, and then gave him two more points down at the bottom because he liked to volunteer for things. He answered, "Really, his personal characteristics he presented above and beyond everyone else in the fact that he received more teasing from fellow employees and he took it without feedback. On the second part, that other job related factors, those were things that were above and beyond his present job. Both of those personal characteristics and absenteeism, acting discipline, job related achievements, those are closely related by definition here given me to evaluate."

As to the Grievant's rating, he was reminded that the second category he rated him low, giving him one point for job related personal characteristics, and one of the big comments was "even though it says Leon--you said you meant Larry--you wrote in after the fact is his teasing, whatever you want to call it, teasing people?" He answered, "Right." But he also took a point off down at

the bottom of the form because he agitated and initiated people, and joked a lot. He was asked if that wasn't penalyzing (sic) him twice for the same thing, he answered, "Yes." He said one is job-related personal characteristics, one was other job-related characteristics. Asked what's the difference? He was unable to explain, and gave confused responses to subsequent questions.

Asked if he had a problem with Grievant's personality, he said he had a problem with the way some of the employees got treated by the Grievant. The Arbitrator pointed out that he was puzzled by the fact that Bardin and Grievant were elected by the Union members to represent them as Stewards and yet he said they were harassing them or teasing them, and those feelings were hard to understand, or comprehend. His answer was "I agree with that." He said he had talked with the Grievant about that, and two mechanics had become extremely nervous prior to the SPP ratings and severincing (sic), and they both had been teased by Leon and Larry about how they themselves were untouchable, and the others ought to be worried. So he asked both Larry and Leon about it, but took no further action. He asked Grievant if there was anything about seniority provision in the contract that said Union officials were to be protected; he answered there was not, but Bardin said he would turn the lights out when he was the last one to leave, and that indicated he was trying to supervise employees who were having their heads not in their work, and that was a dangerous

situation. Asked about his comment or notation about Grievant had a habit of racial comments, he said Grievant had a habit of rubbing the head of Willie Moore, a black man, and Willie had to ask him to quit. On another occasion a black man had a grievance, and during the grievance committee meeting, Larry told a racial joke, and that was communicated back to him. Asked if he had reported to Management that conduct on the part of the Grievant, he answered that he didn't like to discipline someone on hearsay, and that if he caught them they were guilty but if he heard about it word was passed on that it wasn't going to be acceptable. He said, "You just can't supervise on what someone else saw." Asked if Moore had ever filed a complaint about Grievant's conduct, he answered in the negative.

THE GRIEVANT'S DISCIPLINARY RECORD

Company Exhibit 13 is a stack of handwritten pages which concern eleven alleged disciplinary instances which the Company presented to show how substandard Grievant's record was. None was signed and no author testified at the hearing. These covered the period from April 9, 1987 through September 28, 1990. Apparently they had been taken by Mr. Webb from Grievant's personnel file to bolster his testimony of Grievant's sub-standard disciplinary record. These documents will be reviewed chronologically:

1. April 9, 1987 - Grievant did not put water on a belt to prevent a fire, and this belt had a burned place on it the next day; no damage was caused to equipment or was there down-time on production. Loper warned Grievant it must not happen again and Grievant agreed it would not. Loper wrote this up as an Oral Reminder--the first step of the Positive Discipline process--and the time it would be active was six months, or October 10. Grievant told Loper not to blame his Helper, as he was responsible. They ended the discussion amicably.

2. December 29, 1987 (after item (1) was "deactivated" (October 10)--Loper filled out a form entitled "Post Meeting Notes." It concerned Grievant's attendance record. Loper said he told Grievant of the impact that absenteeism has on the Company and how important it was for people always to be at work. He added, "I feel like Larry has never missed unless it was necessary." Importantly, the Form was not denominated a disciplinary action, and apparently Loper was merely cautioning Grievant to try his best.

3. September 8, 1988 - Loper recorded an incident involving the clearance of a C-27A gearbox, but instead Grievant and his Helper tagged out the C-27B. This could have led to serious consequences, but did not. Grievant was again placed on Oral Reminder (first step in Disciplinary procedure) until March 8, 1989. Grievant

agreed to be more careful thereafter to tag the correct unit.

4. February 7, 1989 - Loper wrote that at 3:00 p.m. he saw Grievant and another employee "driving around Unit #2 and #1 to get back to the shop from reclaim tunnels." He said they were "killing time" and needed to be back in the shop cleaning up. He told them to "go to shop and clean up." No disciplinary action of any kind was taken.

5. February 9, 1989 - Loper wrote that Grievant and Bardin said they were filing a grievance concerning Contracting out. He checked with Brown, who advised them that Company workers could not do the work. They said they could do part of it. Loper put them on overtime starting that day. He told Grievant they had been goofing off and not working like they should, and Grievant said they were doing it because of contractors. Loper told them that was no excuse. He also wrote that he found out later from Brown that Grievant went to him first. Finally, Grievant accused Loper of being a "Company man." No resolution of the dispute was recorded, and there was no disciplinary action taken to Grievant.

6. February 15, 1989 - Loper wrote "Was told (Grievant) was in the warehouse again talking to Rosy (Business Agent) on the phone during his work time." No disciplinary action was taken.

7. April 5, 1989 - Loper wrote a page about having left a note on the board (for night shift workers) for Grievant to do the 500 hour Preventive Maintenance on the 657E bulldozer. When he got to work the next morning he asked Grievant if he did the Preventive Maintenance work and Grievant said he could not do it, as he needed more training. Another employee was with Grievant on the night shift and he knew how to do it, and there are also books that tell how. He said this had happened before. He also said he asked the night shift Foreman about this and he said Grievant said he was not going to do the P.M. (This is a possible insubordination, but Management apparently took no action to discipline Grievant in any way--not even an Oral Reminder).

8. June 7, 1989 - Loper wrote, "Did coaching and counseling with (Grievant) about his absenteeism. Showed him the dates he had missed. Talked about policy of (sic) people needed to be at work. (Grievant) had been off because of operation. My opinion was he had to be." No disciplinary action of any kind was taken.

9. July 13, 1989 - Loper reported Grievant was again using telephone in warehouse. He told Warehouse Supervisor to tell him to stay out, but Supervisor said he hated to do that; so Supervisor was to call Loper if he had a problem. He called Grievant aside and asked him why he was using the phone. Grievant replied he was talking

to the Union Business Agent and Loper told Grievant he needed to use Loper's phone on day shift and the Operations phone on the off shift, and also he needed to get permission. Grievant became upset and said he'd talked to Mr. Finley and was told he could do that. Loper said Grievant needed always to check with him. The next day he talked to Grievant again about not using the warehouse phone, and Grievant was upset and said Finley told him he could call the Business Agent whenever he needed, to help get the warehouse contract worked out. He repeated his request for Grievant to let him know and Grievant agreed to do so. He advised Grievant, "if they keep having problems with telephone misuse, there will be some Positive Discipline." There never was. One can hardly consider this a disciplinary action, although the Company relied on it to support its lowered evaluation of Grievant after his last Performance Appraisal in 1988, which Brown and Finley did not review and which Webb did not annotate as the instructions in his own SPP system required.

10. October 4, 1989 - Loper wrote that he asked Grievant if he was going to attend the Limestone Fund (charity drive) meeting. Grievant got mad and said he'd never give them any money and said Loper was trying to make him do so. Finley and Loper talked with Grievant about "his problem" and Grievant called Loper a "liar" and himself (sic) told untrue things about Loper. Grievant

"has a problem with his temper" and he was afraid it was affecting Grievant's health. He also has a bad attitude toward the Company, but Finley told Loper he thought it was because Grievant did not like Loper. Loper said "that is probably one reason, but the main reason is he has a bad attitude." Grievant later came into his office and "seemed to get over being mad." No disciplinary action was taken, the problem apparently fizzled out.

11. September 28, 1990 - Loper wrote he asked Grievant if he checked any tools out of the Tool Room last night. Grievant said he had not, as there was not a warehouseman on duty, and it was a lot of trouble to get a foreman to let him in the warehouse. The report continued, but the second page was not presented, and no conclusion can be reached as to the seriousness of the matter. Apparently no disciplinary action was taken.

Clearly these eleven incidents, only two of which resulted in a first-step discipline and both were de-activated, are all the company had documented to back up its contention that Grievant was a disciplinary problem and had a poor attendance record, which resulted in his being drastically down-rated from 1988 to 1992. This is simply not enough to prove that the Company did not unreasonably discriminate against Grievant in reflecting his bad disciplinary record and giving him such a low SPP score that, as a direct result, he was laid off.

There is also the contention that Grievant was hard on his co-workers, teased them, told racial jokes, and otherwise was unpopular with the workers in the Bargaining Unit. On the other hand, the Union points out that Grievant testified, without refutation by the Company, that he had been elected the only Steward at the plant, with 97 percent of the votes cast, and had stood for re-election two times thereafter and was never opposed, refuting the Company's claim that he should have been down rated because of this element in his performance.

After hearing the Grievant testify at the hearing, the Arbitrator was impressed with his devotion to the members of the Bargaining Unit, and his desire to represent them effectively. This even included filing a number of grievances over the layoff incident, after he himself had been laid off and could have "looked the other way" from his co-workers, but instead saw to it that their rights to grieve were protected by filing grievances with the Plant officials before the filing deadline.

It is also apparent to the Arbitrator that for a Union Steward to represent effectively his Unit, he must be aggressive in dealing with Management people. Although no Manger, including the Plant Manager, spoke disparagingly about his protected activity as a Steward, it is fairly obvious that Loper and Brown, his immediate Supervisors, were displeased with his Union role and possibly by the time it took him away from his work as their subordinate. This is a common problem for

supervisors, and can become a serious cause for resentment. It takes an enlightened Plant Manager to recognize this and try to placate his subordinate managers, and there is little evidence that Mr. Finley did so.

Although there was no evidence that Grievant's rating was reduced because of his Union position and protective activities, it must be noted that the only two Mechanics who were laid off were Bardin, the first Steward, and Grievant, the current Steward, who were the first and third men on the Mechanics' seniority list.

COMPARISON WITH PRIOR UFI ARBITRATIONS

Unlike the SPP ratings in the four UFI cases previously arbitrated and reversed, the evidence in this case is not adequate to provide a basis for recomputing the individual scores that should have been awarded Grievant in the myriad of elements encompassed by the SPP rating form which was used by his Supervisor.

The bottom line is that the evidence clearly shows that the rating procedure used by the Supervisor was unstructured, personally determined, and inconsistent with Grievant's previous Personnel Appraisal. Further, the two Plant Mangers who reviewed his SPP ratings did not correct these shortcomings. All of these missteps were understandable because none of the three raters had--or took the trouble to obtain--Grievant's personnel file which contained his 1988 Performance Appraisals. They

apparently relied on Human Resources Manager Webb to accomplish this.

But he failed to do so. He not only relied on his own judgment concerning the period from 1988 to 1992, but he tried to explain inconsistencies between the Company's treatment of Grievant and Towles for example, by saying he was aware of Towle's (sic) improvement and Grievant's worsened performance. But, worst of all, Mr. Webb failed to follow the instructions in his own SPP system, on page 259, last full paragraph, to state the reasons giving examples which resulted in the lowered rating, and he had previously failed to require the three Supervisors who made the rating to follow the same requirements.

In short, the steps used by the four Company officials did not comply with their own system for the new SPP evaluations. This constituted unreasonable discrimination against Grievant.

A Supreme Court Justice opined, "I cannot define pornography, but I know it when I see it." Here the discrimination practiced against Grievant was so palpable that it cannot be overlooked or excused. This finding of discrimination is based on the four Company officials' improper handling of the ratings described above. The Company did not meet its burden of rebutting the Union's prima facie case of discrimination.

According, this Arbitrator holds that the Company violated Article II, Section 1 of the Collective Bargaining

Agreement when it unreasonably and unjustly discriminated against Grievant when it laid him off.

AWARD

The Grievance must be SUSTAINED. Grievant shall be restored to his former position and made whole for all pay and employment benefits to which he would have been entitled, had he not been improperly laid off in 1992.

From the back pay shall be subtracted (1) All income received by Grievant from other employment and (2) Any Unployment(sic) Compensation benefits which, under Texas law, he is not required to repay.

The Arbitrator retains jurisdiction to resolve any dispute as to the implementation of this Award.

Dallas, Texas
July 26, 1994

Harold H. Leeper
Arbitration

P.S. After this Award had been typed, but before it was duplicated and signed, the Arbitrator received from the Company a copy of Arbitrator Fox's Award in the Kenneth Chaney grievance at Limestone. Arbitrator Fox's Award has been studied carefully to ascertain whether any of its elements have a bearing on the Award in this case.

It appears that the Union's principal challenges in Chaney are (1) discrimination because of Union activity, which Mr. Fox found unsupported by any credible evidence, and (2) incorrect scoring of Chaney on his SPP. That element was similar to an argument that Grievant Walker had been incorrectly rated in his SPP. However, the principal reason for the Arbitrator's reversal decision in this case was not discussed by anyone - Union, Company or Arbitrator: the failure of the four Company officials to follow its own SPP policy for ensuring consistency between the SPP's (sic) and prior Performance Appraisals, documenting reasons for any differences, with specific examples to justify those differences.

Thus, the Award of Arbitrator Fox is not relevant to the discrimination issue in this case, and cannot be considered in reaching a final decision. The initial Opinion and Award is unchanged.

APPENDIX 4

Section 301 of the Labor Management Relations Act is as follows:

"SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor

organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United Sates upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." 29 U.S.C. §185

APPENDIX 5

Section 203(d) of the Labor Management Relations Act of 1947, as amended, states:

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." 29 U.S.C. §173(d)

Supreme Court, U.S.
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MAY 23 1997
CLERK

No. 96-1641

In The

Supreme Court of the United States

October Term, 1996

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 66,

Petitioner,

v.

HOUSTON LIGHTING & POWER COMPANY, A SUBSIDIARY OF HOUSTON INDUSTRIES INCORPORATED, AS SUCCESSOR IN INTEREST TO UTILITY FUELS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MEMORANDUM IN OPPOSITION TO PETITION FOR CERTIORARI

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PARTIES TO THE PROCEEDINGS

Petitioner:

International Brotherhood Of Electrical Workers, Local Union No. 66

Respondent:

Houston Lighting & Power Company, a Subsidiary of Houston Industries Incorporated, as Successor in Interest to Utility Fuels, Inc.

RULE 29.6 LIST

Entities Affiliated With Respondent:

Development Ventures, Inc.; HL&P Energy Services Co.; Houston Industries Incorporated; Houston Industries Finance, Inc.; Houston Industries Energy, Inc.; and Utility Fuels, Inc.

This case arose from the same reduction-in-force that resulted in an arbitration award that the United States Court of Appeals for the Fifth Circuit vacated and which this Court subsequently declined to review earlier this Term. *See Houston Lighting & Power Co. v. International Bhd. of Elec. Workers, Local Union No. 66*, 71 F.3d 179 (5th Cir. 1995), *cert. denied*, 117 S. Ct. 52 (1996) (hereinafter, "*Houston Lighting & Power*"). In the instant case, just as in *Houston Lighting & Power*, the arbitrator exceeded his authority under the same collective bargaining agreement ("CBA") and rendered an award that did not draw its essence from the CBA, as the district court and the Fifth Circuit held. (Pet. App. 1 at 8; *id.*, App. 2 at 5-8.)[1] These were the same reasons for the Fifth Circuit's vacatur of the award in *Houston Lighting & Power*. 71 F.3d at 182-84. Both the decision at issue now and the earlier case on which it relied represent straightforward applications of the "essence" test announced in *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

Because *Enterprise Wheel* is clearly controlling here, there is no reason for the Court to grant certiorari in this case. Therefore, the petition for certiorari should be denied.[2]

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[1] The Petitioner readily admits that its complaints about the decision below mirror those that it raised in its petition for certiorari in *Houston Lighting & Power*: "Indeed, the Fifth circuit Opinion in this case and in fact underlying the Decision of the District Court, were both merely derivative of, and a perpetuation of, the Fifth Circuit's original error in the *Thornal* case." (Pet. Br. at 15 n.4.)

[2] Because of the striking similarity of issues in this case and in *Houston Lighting & Power*, Respondent files this memorandum in lieu of a brief in opposition. *See* Robert L. Stern, et al., SUPREME COURT PRACTICE 374 (7th ed. 1993). If the Court desires further briefing, Respondent will certainly comply with that request. Additionally, Respondent incorporates by reference its brief in opposition in *Houston Lighting & Power* (No. 95-1757), which fully sets forth the reasons why the petition in this case should be denied.

Respectfully submitted,

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